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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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EXAMINER

GARG, YOGESH C

ART UNIT	PAPER NUMBER
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3625

NOTIFICATION DATE	DELIVERY MODE
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11/18/2009

ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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Office Action Summary	Application No. 09/672,523	Applicant(s) JOSEPH ET AL.	
	Examiner Yogesh C. Garg	Art Unit 3625	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 12 October 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 10,11,13-24,27,33,38,39,41-43,45-55,57,63,260 and 262 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 10,11,13-24,27,33,38,39,41-43,45-55,57,63,260 and 262 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>9/10/2009</u> . | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

1. In view of the Panel decision from Pre-Appeal Brief review mailed 10/26/2009 the rejection of the last Office action mailed 6/11/2009 is withdrawn.

The reasons for withdrawing the rejection of the last Office action mailed 6/11/2009 is to set the prosecution record right by correcting the two typographical errors made on page 5 in the sentence "substitute declaration filed on 5/29/2008" and on page 6 in the sentence " The Substitute reissue declaration filed 5/29/2008". The date 5/29/2008 was a typographical error since it should have been 3/30/2009. The examiner considered the Substitute reissue declaration filed 3/30/2009 while responding to the applicant's RCE and submission filed 3/30/2009, as is evident from the fact the examiner responded to the Applicant's arguments filed on 3/30/2009, see page 2 of the action mailed 6/11/2009. Therefore after correcting the above typographical errors the non-final rejection is being resubmitted.

Response to Arguments

2. The applicant's Substitute reissue declaration filed 3/30/2009, arguments filed 3/30/2009 and 10/12/2009 have been fully considered but they do not cure the deficiencies in the Substitute reissue declaration filed 3/30/2009.

The applicant argues that the rejection of claims 10-11, 13-24, 27, 33, 38-39, 41-43, 45-55, 57, 63, 260 and 262 under 35 U.S.C. 251 is incorrect because the reissue claims are adding additional inventions not originally claimed and therefore recapture is not present as per MPEP 1412.02-Recapture of Canceled Subject Matter. The applicant

Art Unit: 3625

states “ *In the pertinent part, MPEP 1412.02 states that If the reissue claims are claiming additional inventions or embodiments not originally claimed, then recapture is not present, and that the complete removal of a limitation that was added to obtain the patent is permitted where the replacement limitation provides a separate invention*”. The examiner respectfully disagrees because reissue claims claiming additional inventions or embodiments not originally claimed are permissible only if any claims amended during prosecution of the original application to obtain the patent are not deleted or broadened by reissue. Since the applicant has canceled all the patented claims which were amended during prosecution of the original application to obtain the patent it is impermissible recapture. The examiner provides below the larger part of MPEP 1412.02 which requires this:

Quote: “ 1412.02 Recapture of Canceled Subject Matter [R-7]

A reissue will not be granted to "recapture" claimed subject matter which was surrendered in an application to obtain the original patent. *North American Container, Inc. v. Plastipak Packaging, Inc.*, 415 F.3d 1335, 75 USPQ2d 1545 (Fed. Cir. 2005), *Pannu v. Storz Instruments Inc.*, 258 F.3d 1366, 59 USPQ2d 1597 (Fed. Cir. 2001); *Hester Industries, Inc. v. Stein, Inc.*, 142 F.3d 1472, 46 USPQ2d 1641 (Fed. Cir. 1998); *In re Clement*, 131 F.3d 1464, 45 USPQ2d 1161 (Fed. Cir. 1997); *Ball Corp. v. United States*, 729 F.2d 1429, 1436, 221 USPQ 289, 295 (Fed. Cir. 1984); *In re Wadlinger*, 496 F.2d 1200, 181 USPQ 826 (CCPA 1974); *In re Richman*, 409 F.2d 269, 276, 161 USPQ 359, 363-364 (CCPA 1969); *In re Willingham*, 282 F.2d 353, 127 USPQ 211 (CCPA 1960).

I. THREE STEP TEST FOR RECAPTURE:

In *Clement*, 131 F.3d at 1468-70, 45 USPQ2d at 1164-65, the Court of Appeals for the Federal Circuit set forth a three step test for recapture analysis. In *North American Container*, 415 F.3d at 1349, 75 USPQ2d at 1556, the court restated this test as follows:

We apply the recapture rule as a three-step process:

.....C. The Third Step - Were the reissued claims materially narrowed in other respects ***>*, so that the claims may not have been enlarged, and hence< avoid the recapture rule?

As pointed out above, the third prong of the recapture determination set forth in **>North American Container<* is directed to analysis of the broadening and narrowing effected **>by<* the reissue claims, and of the significance of the claim limitations added and deleted, using the prosecution history of the patent (to be reissued), to determine whether the reissue claims should be barred as recapture.

The following discussion addresses analyzing the reissue claims, and *which claims* are to be compared to the reissue claims in determining the issue of surrender (for reissue recapture).

Art Unit: 3625

When analyzing a reissue claim for the possibility of impermissible recapture, there are two different types of analysis that must be performed. If the reissue claim "fails" either analysis, recapture exists.

First, the reissue claim must be compared to any claims canceled or amended during prosecution of the original application. It is impermissible recapture for a reissue claim to be as broad or broader in scope than any claim that was canceled or amended in the original prosecution to define over the art. Claim scope that was canceled or amended is deemed surrendered and therefore barred from reissue. *In re Clement, supra*.

Second, it must be determined whether the reissue claim * omits >or broadens< any limitation that was added/argued during the original prosecution to overcome an art rejection. Such an omission in a reissue claim, even if it includes other limitations making the reissue claim narrower than the patent claim in other aspects, is impermissible recapture. *Pannu* **, 258 F.3d at 1371-72, 59 USPQ2d at 1600. In any broadening reissue application, the examiner will determine, on a claim-by-claim basis, whether the broadening in the reissue application relates to subject matter that was surrendered during the examination of the patent that is the subject of the reissue application because such subject matter was added and/or argued to overcome a rejection. **If surrendered subject matter has been entirely eliminated from a claim in the reissue application, or has been in any way broadened in a reissue application claim, then a recapture rejection under 35 U.S.C. 251 is proper and must be made for that claim.**

If, however, the reissue claim(s) are really claiming additional inventions/embodiments/species not originally claimed (i.e., overlooked aspects of the disclosed invention), then recapture will not be present. Note the following examples:

Assume that, in the original prosecution of the patent, applicant claimed a method of making a glass lens, where the ion implantation step used a molten bath to diffuse ions into the lens, and that step had to be amended to recite a pressure of 50-60 PSI and temperature between 150-200 degrees C - to define over the art. **That pressure and temperature range-set is "frozen" in place for any molten bath ion implantation claim, and it cannot be deleted or broadened by reissue.** However, if in the original application, applicant had failed to claim a disclosed embodiment to plasma ion implantation (i.e., using a plasma stream rather than a molten bath to provide the ions), that is a proper 35 U.S.C. 251 error, which can be corrected by reissue. Applicant can, in a reissue application, add a set of claims to plasma ion implantation, without including the "50-60 PSI and temperature between 150-200 degrees C" limitation. The "50-60 PSI - 150-200 degrees C limitation" is totally irrelevant to plasma implantation and is clearly wrong for the plasma species/embodiment, as opposed to being right for the molten bath species/embodiment. Also, if in the original application, applicant failed to claim the method of placing two lenses made by the invention in a specified series to modulate a laser for cutting chocolate, that too is a proper 35 U.S.C. 251 error, which can be corrected by reissue. In this lens placement method, it does not matter how the specific lens having the implanted ion gradient was made, and the "50-60 PSI and temperature between 150-200 degrees C" limitation is again not relevant. *Hester Industries, Inc. v. Stein, Inc., supra*, addressed this concept of overlooked aspects, stating:

[T]his principle [i.e., avoidance of the recapture rule], in appropriate cases, may operate to overcome the recapture rule when the reissue claims are materially narrower in other **overlooked aspects** of the invention. The purpose of this exception to the recapture rule is to allow the patentee to obtain through reissue a scope of protection to which he is rightfully entitled for such overlooked aspects. [*Hester*, 142 F.3d at 1482-83, 46 USPQ2d at 1649-50.][Emphasis added]

See also *B.E. Meyers & Co. v. United States*, 56 USPQ2d 1110 (US CtFedClis 2000), where the Court of Federal Claims permitted the complete removal of a limitation that was added to obtain the patent, where the replacement limitation provided a separate invention.<".

Unquote: As it can be seen from the above MPEP 1412.02 C that overlooked aspects can be claimed in a reissue application but the claims that were amended and narrowed to obtain patent in the original application cannot be deleted. In the instant reissue application the applicant has deleted the claims that were amended and narrowed to obtain patent in the original application and hence there is impermissible recapture.

Therefore, in view of the foregoing, rejection of claims 10-11, 13-24, 27, 33, 38-39, 41-43, 45-55, 57, 63, 260 and 262 under 35 U.S.C. 251 is sustainable.

Substitute Oath/Declaration

3. Substitute declaration filed on 3/30/2009 is entered but found defective.

Claims 10-11, 13-24, 27, 33, 38-39, 41-43, 45-55, 57, 63, 260, and 262 are rejected as being based upon a defective reissue declaration under 35 U.S.C. 251 as set forth above. See 37 CFR 1.175.

The nature of the defect(s) in the Substitute declaration is set forth in the discussion below in this Office action.

The Substitute reissue declaration filed 3/30/2009 with this application is defective because the error which is relied upon to support the reissue application is not an error upon which a reissue can be based. See 37 CFR 1.175(a) (1) and MPEP § 1414.

Art Unit: 3625

The filed Substitute declaration does not identify the existence of an error in the specification, drawings, or claims, which error causes the original patent to be defective. *In re Wilder*, 736 F.2d 1516, 222 USPQ 369 (Fed. Cir. 1984). All that is needed for the oath/declaration statement as to error is the identification of "at least one error" relied upon. In identifying the error, it is sufficient that the reissue oath/declaration identify a single word, phrase, or expression in the specification or in an original claim, and how it renders the original patent wholly or partly inoperative or invalid. The filed declaration does not do this. Instead it merely states that the original claims did not cover certain embodiments/language being presented by new claim 10. **This statement of error is not sufficient because it does not identify a single word, phrase, or expression in the specification or in an original claim (s) 1-9, and how it renders the original patent wholly or partly inoperative or invalid.** The statement filed is no better than saying in the reissue declaration that this "application is being filed to correct errors in the patent which may be noted from the change made by adding new claim 10", see MPEP 1414, II, C.

Claim Rejections - 35 USC § 251

4. Claims **10-11, 13-24, 27, 33, 38-39, 41-43, 45-55, 57, 63, 260, and 262** are rejected under 35 U.S.C. 251 as being an improper recapture of broadened claimed subject matter surrendered in the application for the patent upon which the present reissue is based.

Art Unit: 3625

Note: Please also refer to the arguments provided above in support of this rejection.

The "recapture rule," prevents a patentee from regaining, through a reissue patent, subject matter that the patentee surrendered in an effort to obtain allowance of claims in the patent sought to be reissued. *In re Clement*, 131 F.3d 1464, 1468, 45 USPQ2d 1161, 1164 (Fed. Cir. 1997).

Clement discusses a three-step test for analyzing recapture:

Step 1 involves a determination of whether and in what aspect any claims sought to be reissued are broader than the patent claims.

Step 2 involves a determination of whether the broader aspects of the reissue application claims relate to surrendered subject matter.

Step 3 is applied when the broadening relates to surrendered subject matter and involves a determination whether the surrendered subject matter has crept into the reissue application claim.

Substep (3): if the reissue claim is broader in some aspects, but narrower in others, then:

(a) if the reissue claim is as broad as or broader in an aspect germane to a prior art rejection, but narrower in another aspect completely unrelated to the rejection, the recapture rule bars the claim;
(b) if the reissue claim is narrower in an aspect germane to [a] prior art rejection, and broader in an aspect unrelated to the rejection, the recapture rule does not bar the claim, but other rejections are possible.

The Federal Circuit in *North American Container, Inc. v. Plastipak Packaging, Inc.*, 415 F.3d at 1350, 75 USPQ2d 1545 (Fed. Cir. 2005) further refined Substep (3) (a) of *Clement* to define "broader in an aspect germane to a prior art rejection" to mean broader with respect to a specific limitation

(1) added to overcome prior art in prosecution of the application which matured into the patent sought to be reissued and
(2) eliminated in the reissue application claims.

"Surrendered subject matter" is defined in connection with prosecution history estoppel in *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 733-34, 122 S. Ct. 1831, 1838, 62 USPQ2d 1705, 1710-11 (2002). A patentee's decision to narrow his claims through amendment "may be presumed to be a general disclaimer of the territory between the original claim and the amended claim." *Exhibit Supply*, 315 U.S., at 136-137, 62 S. Ct. 513. "...in determining whether 'surrender' of subject matter has occurred, the proper inquiry is whether an objective observer viewing the prosecution history would conclude that the purpose of the patentee's

Art Unit: 3625

amendment or argument was to overcome prior art and secure the patent." *Kim v. ConAgra Foods, Inc.*, 465 F.3d 1312, 1323, 80 USPQ2d 1495, 1502 (Fed. Cir. 2006).

A further opinion, *Ex parte Eggert*, 67 USPQ2d 1716 (BPAI 2003), issued by the Board of Appeals and Interferences as a precedential opinion, is also part of the recapture precedent applicable to proceedings before the United States Patent & Trademark Office (USPTO). *Eggert* was entered on May 29, 2003, prior to the Federal Circuit's *North American Container* decision. In *Eggert* the majority held that the surrendered subject matter was the rejected claim **only** rather than the amended portion of the issued claim.

A published precedential opinion of the Board is binding unless the views expressed in an opinion in support of the decision, among a number of things, are inconsistent with a decision of the Federal Circuit. In this case, the majority view in *Eggert* is believed to be inconsistent with the subsequent Federal Circuit decision in *North American Container* with respect to the principles governing application of Substep (3)(a) of *Clement*. See: *Ex parte Franklin C. Bradshaw and Thomas L. Soderman*, (Appeal 2006-2744 Bd. Pat. App. & Int. July 19, 2007) (available in Application 09/664,794 and at <http://www.uspto.gov/web/offices/dcom/bpai/its/fd062744.pdf>); *Ex parte Raanan Liebermann*, (Appeal 2007-0012 Bd. Pat. App. & Int. May 2007) (available in Application 09/603,247 and at <http://www.uspto.gov/web/offices/dcom/bpai/its/fd070012.pdf>); *Ex parte Willibald Kraus* (Appeal 2005-0841 Bd. Pat. App. & Int. April 2005) (available in Application 08/230,083 and at <http://www.uspto.gov/web/offices/dcom/bpai/its/fd050841.pdf>)

As set forth in the above BPAI decisions, based on *North American Container* and other court decisions, surrendered subject matter is considered the subject matter of an application claim which was amended or canceled and, on a limitation-by-limitation basis, the territory falling between the scopes of

- (a) the application claim which was canceled or amended and
- (b) the patent claim which was ultimately issued.

Accordingly, the "surrendered subject matter" that may not be recaptured through reissue should *be presumed* to include subject matter broader than the patent claims in a manner directly related to

- (1) limitations added to the claims by amendment (either by amending an existing claim or canceling a claim and replacing it with a new claim with that limitation) to overcome a patentability rejection and
- (2) limitations argued to overcome a patentability rejection without amendment of a claim.

Art Unit: 3625

However, when reissue claims are narrower than the patent claims with respect to features other than the surrender generating feature, then the reissue claims may be materially narrowed relative to the claims prosecuted and issued in the patent, thereby avoiding the recapture rule.

As explained in *Hester Industries, Inc, v Stein, Inc.*, 142 F.3d 1472,1480, 46 USPQ2d 1641, 1647 (Fed. Cir. 1998), the recapture rule is avoided when two conditions are satisfied. First, an aspect of the invention must have been overlooked (e.g., not claimed) during patent prosecution. Second, the reissue claim must have been materially narrowed with respect to this overlooked aspect of the invention.

In summary, the recapture rule is avoided if the reissue claim was materially narrowed in other respects compared to its broadening surrendered aspect. A reissue claim is materially narrowed and thus avoids the recapture rule when limited to aspects of the invention:

- (1) which had not been claimed and thus were overlooked during prosecution of the original patent application; and
- (2) which patentably distinguish over the prior art.

In the instant case, the reissue claims satisfy the “recapture rule” preventing a patentee from receiving a reissue patent as per both *Clement three steps test* and *Hester Industries, Inc, v Stein, Inc.*, 142 F.3d 1472,1480, 46 USPQ2d 1641, 1647 (Fed. Cir. 1998) as analyzed below:

A: Analysis per *Clement three-step test*:

New claims 10-11, 13-24, 27, 33, 38-39, 41-43, 45-55, 57, 63, 260, and 262 are broader than the patented claims 1-9 because they do not include limitations recited in the patented claims 1-9. There was a surrender of subject matter in the original application prosecution and the broadening of the reissue claims is in the area of the surrendered subject matter. The omitted/broadened limitations in the reissue claims are directed to limitations relied upon by the applicant

Art Unit: 3625

in the original application to make the claims allowable over prior art (At a minimum, the claims require at least one of the following limitations which were argued as the patentable feature for the issued independent claims 1, 6, 7, and 9 in the 08/233,908 application: *a source of a data stream providing a series of time division multiplexed packets, ones of which contain auxiliary data that represent a video program, and others of which represent a distributed computing application associated with said video program, and wherein said distributed computing application is repetitively transmitted independent of receiving client computer apparatus during times that said video program is transmitted OR a client computer, which includes a packet selector connected to said source for selecting and directing packets containing said auxiliary data representing said video program to a video signal processor and selecting and directing packets containing said associated distributed computing application to a further processor OR further processor including means to assemble said distributed computing application and execute said distributed computing application to form an interactive video program in which execution of said distributed computing application alters said video program OR a source of a time division multiplexed packet signal including a plurality of distributed computing applications, each distributed computing application being repetitively transmitted independent of receiving client computer apparatus, and each of said distributed computing applications being in a form of a series of packets OR a first one of packets of a respective series containing data representing an executable code module and including identification information indicating that the first one of packets of said series contains data representing said executable code module OR the client computer extracts said directory module from the data stream and using data contained in the directory module extracts packets associated with said distributed computing application and builds said distributed computing application and executes said distributed computing application*

Art Unit: 3625

OR read/write memory, coupled to the system bus; a data stream input/output adapter, coupled between the data stream receiver and the system bus, for receiving the extracted distributed computing application representative data from the data stream receiver, and storing it in the read/write memory, and having a control output terminal coupled to the selection control input terminal of the data stream selector, for producing the selection control signal; and a processor, coupled to the system bus, for controlling the data stream input/output device to generate a selection control signal selecting a specified one of the plurality of data streams, and for assembling and executing the distributed computing application stored in the read/write memory.). The filed re-issue claims are broader than the original patent claims by not including the surrender-generating limitations (as described above) will be barred by the recapture rule even though there is narrowing of the claims not related to the surrender-generating limitation. As stated in the decision of *In re Clement*, 131 F.3d at 1470, 45 USPQ2d at 1165, if the reissue claim is broader in an aspect germane to a prior art rejection, but narrower in another aspect completely unrelated to the rejection, the recapture rule bars the claim. *Pannu v. Storz Instruments Inc.*, *supra*, then brings home the point by providing an actual fact situation in which this scenario was held to be recapture.

B: Analysis as per *Hester Industries, Inc. v Stein, Inc.*: In order to satisfy the two conditions, the subject matter that materially narrows the reissue claims should

Art Unit: 3625

be the overlooked aspect of the original invention claimed in the patent. In the instant case, the reissue claims do not include any subject matter of the patented claims (independent patented claims 1, 6, 9, 10) but instead the subject matter that materially narrows the reissue claims is directed to a distinct and different invention and it is not the overlooked aspect of the original invention.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Yogesh C. Garg whose telephone number is 571-272-6756. The examiner can normally be reached on Increased Flex/Hoteling.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jeffrey A. Smith can be reached on 571-272-6763. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 3625

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Yogesh C Garg/
Primary Examiner, Art Unit 3625